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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

SIGNATROL, INC., a corporation, JOHN W. SUTPHIN, WILLARD E. BACHMAN, JOSEPH E. McNAMARA and WENDELL R. WALKER,

Petitioners,

vs.

EDWARD J. SCHULENBURG, EDWARD J. SCHULENBURG, JR., HELEN E. SCHULENBURG and MARIE E. POTTEBAUM, Co-partners doing business as TIME-O-MATIC COMPANY, TIME-O-MATIC, INC., a Corporation, and E-S INDUSTRIES, INC.,

Respondents.

BRIEF OF EDWARD J. SCHULENBURG ET AL., RESPONDENTS, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The respondents oppose the Petition for a Writ of Certiorari, file this brief in support of their opposition and pray that the petition for a Writ of Certiorari filed herein be denied.

Jurisdiction.

It is quite evident that under the first clause of Section 1257(3) the Court has no jurisdiction to issue a Writ of Certiorari for the reason that the decree sought to be reviewed does not involve the validity of a treaty or statute of the United States.

The jurisdiction of the Court, if any, therefore must be found in the second clause. Petitioners do attempt to set up a right, privilege or immunity under the Constitution. Their claim is that as employees they have the right and privilege to copy trade secrets and use those trade secrets with complete immunity, in competing with their employer. Respondents say that as employees they have no such right, privilege or immunity and that, therefore, no constitutional question is involved.

In this connection the Court should also note that the judgment of the Supreme Court of Illinois rests on adequate state grounds and, therefore, the Court should apply the rule laid down in *Black* v. *Cutter Laboratories* (Cal. 1956) 351 U.S. 292, 298, rehearing denied 352 U.S. 859.

> " . . . we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds."

STATEMENT.

1. The questions presented are not truly stated in the Petition for Certiorari (pp. 3-4), and must be re-stated. Before re-stating them, however, we find it necessary to clarify the facts and then we shall re-state the questions.

As a preface to the questions presented, in paragraph 1, at the top of page 3 of the Petition, petitioners make a serious misrepresentation of the record when they say:

> "On the theory that widely-circulated drawings and blueprints describing the parts of a simple, unpatented electrical device were trade secrets, *contrary to the undisputed evidence in this record,* the Illinois Supreme Court in this case has made a serious inroad into the Federally-protected right of copying any unpatented article * * *." (emphasis added.)

In view of what the petitioners and their witnesses said on the witness stand the foregoing is a most astounding statement. Let us see what the record says:

> Petitioner Sutphin, who is also the president of petitioner Signatrol, Inc., said that the Time-O-Matic drawings were available for inspection only to employees of Time-O-Matic or to suppliers or prospective suppliers of parts to Time-O-Matic (R. 177, Ab. 56).
>
> Petitioner McNamara said that nobody had a right to those plans and specifications and blueprints unless they had business with Time-O-Matic Company in one status or another (R. 1003, Ab. 292).
>
> Lee Sherman, a former employee of respondent Time-O-Matic, called as a witness by petitioners, said that during his employment, the blue-prints were limited to employees and were not public information (R. 742-743, Ab. 208).

William Hughes, another former employee of Time-O-Matic, was called as a witness by petitioners and he said that even though he had not been specifically told, it was his understanding that the information contained on those plans and drawings was available only to Time-O-Matic employees and he considered it as such (R. 752, Ab. 211).

In their desperation petitioners have attempted to say that when plans, drawings and specifications were sent out of the plant to suppliers, such plans, drawings and specifications lost their classification as trade secrets. The record is to the contrary.

Dale Beck, President of Danville Stamping Company, called as a witness by petitioners, said (R. 716, Ab. 198, 199):

> "We have made parts for Time-O-Matic . . . We were furnished Time-O-Matic prints at the time that those parts were made. Those prints were given to us by Time-O-Matic Company. I have no knowledge that any mention was made that those prints were secret, but again I treated them as that. *We would treat the plans of any person for whom we made parts as secret.*" (emphasis supplied)

And by way of further emphasis we would repeat that this is petitioners' witness and he was testifying for petitioners on direct examination.

At this point and in this connection the Court should consider the position and testimony of petitioner Sutphin. This petitioner, on the witness stand testifying for petitioners, related how trade secrets are handled in his own plant. He said (Ab. 66, 67):

> "Signatrol has a complete set of drawings and sketches of all the component parts of its products.

> No one would be permitted these sketches and drawings unless he had some reason to, which reason would be that he worked for us or *performed a duty for us.* It would need to be someone concerned with the progress and operation of our business. The drawings and prints of the component parts of Signatrol products are not open to inspection by our competitors. The only persons permitted access to these drawings would be employees *or suppliers or someone who had a reason for such access in connection with the company operation. We send the drawings to individuals who have reason therefor, for use in connection with company business, and their employees have access to those drawings.*'' (emphasis supplied)

The evidence before the trial court, presented in most part by the petitioners themselves and by their own witnesses, proved conclusively that the respondents were the owners of trade secrets, that petitioners while still employees of respondents, filched those trade secrets, copied them and having set up a business used them to compete with respondents. We ask this Court to consider as absolutely false the phrase "contrary to the undisputed evidence in the record.'' This is a trade secrets case in which the existence of the trade secrets was clearly and definitely established by the evidence and has been so found by three courts.

2. Petitioners say that the decree for injunction denies to them equal protection of the laws and deprives them of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment.

Respondents say that petitioners' claim must be considered not in the abstract but in connection with this case

decided by the Supreme Court of Illinois. This case has three important characteristics:

a. It does not involve any patent, any patent law or any claim for patent protection.

b. It does not involve any statute of the State of Illinois, relating to copying, passing off or labelling.

c. It involves trade secrets only and says that when employees filch trade secrets, copy them and use them to compete with the employer, such employees may be enjoined from further use of such trade secrets and must respond in damages.

3. Petitioners use the word "monopoly" in a most evanescent manner. At times apparently they are referring to a patent monopoly, which, we assume, is the limited monopoly created by a patent. Wherever they mention monopoly in this framework it makes no sense for the reason that in this case no patent or patent right is involved. If they use it in the sense of excluding others from the manufacture of flashers it likewise makes no sense. This injunction prevents one corporate defendant and four individual defendants from using plaintiffs' blueprints, plans, specifications and tolerances, in manufacturing flashers, for a limited time, not yet decided, but estimated by plaintiffs to be two years.

Assuming that there are 150,000 corporations and 180,000,000 persons in the United States, it would appear that after this petition for certiorari is denied, 149,999 corporations and 179,999,996 persons will still be able to manufacture these flashers. That is why we say that petitioners' claim of monopoly makes no sense.

QUESTIONS PRESENTED.

The three questions posed by respondents when properly related to the proven facts should be restated as follows:

1. Is there any conflict between the law of trade secrets and that established by this Court in the cases of *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (Sears) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (Compco), which requires the attention of this Court?

2. Does a decree for injunction and damages in a trade secrets case deprive defendants of liberty and property without due process of law?

3. Does a decree in a trade secrets case violate any concept of Federally protected freedom of commerce and tend toward monopoly?

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THE COURT.

I.

THIS COURT HAS RECOGNIZED THE LAW OF TRADE SECRETS AND THERE IS NO CONFLICT BETWEEN THAT LAW AND THE LAW ESTABLISHED BY SEARS AND COMPCO.

Rule 19 says, in substance that this Court may grant a writ of certiorari "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

An analysis of the petition and reasons stated show that it falls far short of meeting the alternative standards set by Rule 19.

The heart of the decision by the Supreme Court of Illinois is that of trade secrets. The law of trade secrets does not involve a federal question at all. There is no provision in the Constitution and there is no federal statute which forbids any court to award damages and grant injunctive relief to the owner of trade secrets.

There is nothing in the *Sears* and *Compco* cases which warrant the granting of the petition for a writ of certiorari. These cases, held to their facts, simply state that where a design is unpatentable, a competitor may copy it and sell the resultant product. The "copying" was in each case done by honest means by a member of the general public and not while a confidential relationship existed between the parties.

Applying the teaching of *Sears* and *Compco* to the facts in this case they would provide that a competitor, having acquired respondents' flasher in the open market, could take it to his laboratory, make copies of the parts, work out the tolerances and within a couple of years come up with an acceptable product and market the product, even, perhaps, irrespective of the confusion of source. In fact, that is what A. B. McMahan, of Minneapolis, a competitor of respondents did and respondents made no complaint. (Ab. 126, 127, App. 42).

Respondents here, however, do not seek relief based upon confusion of source. Petitioners, it is claimed, in breach of trust growing out of a confidential relationship, to-wit: employer-employee, have wrongfully appropriated and are using respondents' property to the damage and detriment of respondents (R. 30-34, Ab. 2-6). And there is nothing in *Sears* or *Compco* which would warrant the inference that the Supreme Court is now countenancing what has come to be regarded as industrial theft.

The Servo Case.

Precisely in point is the case of *Servo Corp. of America* v. *General Electric Company,* 337 F.2d 716 (C.A. 4, 1964) rehearing denied with opinion 342 F.2d 993 (C.A. 4, 1965) where the Court of Appeals while invalidating plaintiff's patents, nonetheless found the defendant guilty of unfair competition based upon violations arising out of a confidential relationship, and stated:

> "Courts long have recognized that where the holder of a trade secret imparts it to another in confidence and that other person appropriates it for his own use, equitable remedies may be invoked to right the wrong."

As to the alleged clash in policy between the patent laws and the trade secrets law raised by petitioners, the following language from *Servo* is applicable (quoting from an earlier decision of the same court in *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F.2d 912 (1935)' cert. denied 298 U.S. 673 (1936)):

> "It would be a reproach to any system of jurisprudence to permit one who has received a disclosure in confidence to thus appropriate the ideas of another without liability for the wrong."

The Court of Appeals in *Servo* also has dealt with the contention that *Sears* has somehow changed the law of trade secrets. Referring to *Sears* the Court stated:

> "In that case the action was grounded upon a state statute which gave a remedy for copying resulting in confusion as to the source of manufacture. In that case the Court held that a manufacturer whose design and mechanical patents were invalid for want of invention cannot under a state unfair competition law obtain an injunction against copying its product nor an award of damages for such copying, as such a use of a state law conflicts with the federal government's power to grant patents. The Court went on to hold that an unpatented article being in the public domain may be freely copied as the federal patent law had pre-empted the field from state action. This case, however, is one of unjust enrichment through breach of a confidential relationship and the remedy is derived from the court's power to award general equitable relief."

The trade secret concept is not destructive of the policy sought to be advanced by federal patent law. The petitioners to the contrary notwithstanding, the policy of our patent system and that which gives enforcement to property rights known as trade secrets are not mutually exclu-

sive and do not clash. Thus, in *Becker* v. *Couture*, 279 U.S. 388, 390 (1929), this Court said:

> "It is not denied that the jurisdiction of the courts of the United States is exclusive in the case of suits arising under the patent laws, but it was held below that the suit in the State Court did not arise under those laws. It is plain that that suit had for its cause of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject matter . . . [the] claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust . . . [citing cases]"

The fact is that the underlying purpose of the patent laws is to encourage invention by rewarding the inventor with a limited right to exclude the general public from the use of the invention. The law of trade secrets, however, has a completely different purpose. It has as its foundation not the encouragement or discouragement of invention or advance in the arts and sciences, but rather the protection and safeguarding of secret and confidential knowledge, data and information from unlawful incursion by one in a contractual or confidential relationship—in this case, that of Employer and Employee.

Thus, the basis upon which trade secret protection is granted has nothing to do with patent law or other federal policy. The essence of the remedy is to repair, redress or enjoin a breach of faith, and the reaping of gain thereby.

Other Recent Cases.

In addition to *Servo*, two other cases recently decided should be noticed and considered. The first is *Edgar H. Wood Associates, Inc.* v. *Skene*, 347 Mass. 355, 197 N.E. 2d 886 (1964). In that case the Supreme Judicial Court of

Massachusetts had before it a case where the employee had left the plaintiff's employment, took with him plaintiff's plans for apartment buildings, copied them and used them. The Court held that the plaintiff had a common law copyright in the plans, considered the *Sears* and *Compco* cases, and said:

> "In our view these decisions recognize that the common law copyright may exist, by virtue of 17 U.S.C. § 2 (1958) in unpublished material which has not become a fact of the public domain. Accordingly, if Wood's plans have not been published as to be within the public domain, the Supreme Court decisions do not preclude relief in the predatory situation here alleged."

The second is *Wallace & Tiernan, Inc.* v. *James B. Harrison et al,* Civil Action No. C63-555, U.S.D.C., N.D. Ohio, 1964, (Unreported). In that case the complaint charged the defendants with the use of secret and confidential information, knowledge and data obtained by the defendants Harrison and Ditzel while they were in plaintiff's employ, said use allegedly being in violation of restrictive agreements signed by these two defendants. Defendants filed a suit for summary judgment, cited the *Sears* and *Compco* cases and argued that the complaint did not state a cause of action.

Kolbfleisch, D. J., considered the motion by defendants for a summary judgment to be a motion to dismiss. After a full analysis of the *Sears, Compco* and *Servo* cases, the court said:

> "The present case alleges not only a breach of a confidential relationship but a breach of a contractual and fiduciary duty not to use or disclose secret and confidential information. Upon the allegations of the

> complaint in this case, it cannot be said that a State law which protects one person from an abuse of the confidence he has shared with another person clashes with the objectives of the federal patent laws as enunciated in *Sears* and *Compco.*"

Thus, we have three cases distinguishing *Sears* and *Compco: Servo* on the basis of trade secrets alone, Wood on the basis of common law copyright and *Wallace & Tiernan* on the combined basis of trade secrets and contract.

The Legal Literature

At page 20 of their brief petitioners come up with the proposition that the legal literature bearing on the proper relationship of the Court's opinion in *Sears* and *Compco* to trade secret cases all indicate the desirability of a grant of certiorari here to delineate the extent, if any, to which a state court may go in restricting the Federally-protected right to duplicate unpatented devices. In a footnote they cite two articles: "Product Simulation: A Right or a Wrong?" by Daphne R. Leeds, Milton Handler, Walter J. Derenberg, Ralph S. Brown, Jr., and Paul Bender, 64 Columbia L.R. 1178, at 1189, 1203, 1208 (1964); "The Sears and Compco Cases: A Federal Right to Compete by Copying," by Lionel Kestenbaum, 51 American Bar Journal 935, at 938 (Oct. 1965).

We let this legal literature speak for itself. Professor Handler at pages 1189 and 1190, says:

> "Suppose a manufacturer has a valuable trade secret which one of his competitors wrongfully procures. Is this another area, though not explicitly mentioned in *Sears* or *Compco,* in which a re-evaluation of well settled legal principles is required? By definition, a trade secret is not patented; frequently it is unpatentable. Yet so long as secrecy is maintained, relief will be afforded against appropriation. See e.g. *Peabody*

> v. *Norfolk,* 98 Mass. 452 (1868). See generally 2 Callman Unfair Competition and Trade Marks, Note 27, §§ 51-59; Restatement Torts §§ 757-59 (1938). Recovery is not limited to money damages; an injunction will issue against a repetition of the wrong, and, in addition, against the use of the secret itself. In other words, the courts are granting a limited monopoly in an unpatented article or process against a wrongdoer, who, by his conduct, has forfeited the right available to everyone else to use the subject matter of the secret when fairly discovered. Has this body of law also been discarded by *Sears* and *Compco*?
>
> * * *
>
> Despite Justice Black's absolute language, I find it hard to believe that the Court intended to jettison the large body of state law of unfair competition which has developed over the last century and a half."

Mr. Kestenbaum, writing to the same effect, at page 938, says:

> "Of course there would still remain other subjects involving copying in the broad sense, as to which *Sears* and *Compco* are not dispositive. For example, I have little doubt that courts will continue to enforce covenants not to compete and grant relief for a trade secret in violation of a confidential relationship, [*Servo Corporation* v. *General Electric Company,* 337 F.2d 716, (4th Cir. 1964); *Edgar H. Wood Associates Inc.* v. *Skene,* 197 N.E. 2d 886, (Mass. 1964)], although they prohibit (or award damages for) the copying and making of unpatented articles."

We have looked searchingly and long at this legal literature and we fail to see that it indicates the desirability of a grant of certiorari in a trade secrets case. Neither Professor Handler nor Mr. Kestenbaum appears to have any great unsatisfied desire for certiorari. On the contrary, Professor Handler and Mr. Kestenbaum are quite content with the law of trade secrets as it now exists. We humbly suggest to the Court that it be left "as is".

II.

THE INJUNCTION DOES NOT DEPRIVE PETITIONERS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

(answering Petitioners' Point II)

Under this point (Brief p. 21) petitioners admit that they obtained their information regarding the respondents' flasher while employed by the respondents. Then they proceed to say that this is not enough to justify the palpable discrimination against the petitioners which is a violation of the first section of the Fourteenth Amendment.

Petitioners cite no cases in support of their claim. Perhaps their research failed to reveal any case which would support this fanciful position.

As a matter of fact the law on this point was settled by this Court nearly fifty years ago, in the case of *DuPont Powder Co.* v. *Masland,* 244 U.S. 100, 102 (1917) involving a suit as here, to enjoin the use of trade secrets by a defendant who had acquired knowledge while employed by plaintiff. Mr. Justice Holmes, speaking for the court said:

> "The word property as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. *Therefore the starting point for the present matter is not property or due process of law, but that the defendants stood in confidential relations with the plaintiffs,*

> *or one of them.* These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations." (emphasis added.)

This identification of confidential relationship as the starting point or foundation of the law of trade secrets stands in the mainstream of long established precedent.

In *Youvatt* v. *Winyard* (1820) 1 Jac. & W. 394, it appeared that plaintiff was the proprietor of veterinary medicines and that defendant, employed as an assistant, surreptitiously got access to plaintiff's book of recipes, copied them and sold the medicines, with printed papers for administering them, which was almost literal copies of those composed by plaintiff. Lord Chancellor Eldon granted the injunction upon the ground of "there having been a breach of trust and confidence."

A century later the Supreme Judicial Court of Massachusetts uses the same significant words in *Wireless Specialty Apparatus Co.* v. *Mica Condenser Co.* (1921) 239 Mass. 158, 131 N.E. 2d 307, when it said:

> "The fundamental requirement for relief is a violation of trust and confidence. Anyone who gets knowledge honestly can use it provided he has not restrained by the relationship under which he acquired it."

Petitioners have not been deprived of their liberty and property without due process of law.

III.

THE STATE COURT JUDGMENT DOES NOT VIOLATE THE CONCEPT OF FEDERALLY PROTECTED FREEDOM OF COMMERCE AND DOES NOT TEND TOWARD MONOPOLY.

(answering Petitioners' Point III)

Again petitioners are comfortably general and vague in their statements and cite no cases for their authority.

In preparation for this brief we have examined dozens of cases involving trade secrets and we fail to find one single case where it was ever said that the relief granted in a trade secrets case tended toward monopoly. All the cases indicate that the purpose of that relief is to restore to the owner of the trade secrets at least part of what has been taken away from him.

For example, in *Hoeltke* v. *C. M. Kemp Mfg. Co.* (C.C.A. 4 (1935)) 80 F.2d 912, cert. denied 298 U.S. 673 (1936) the court says:

> "... where in advance of granting a patent, an invention is disclosed to one who, in breach of the confidence thus reposed, manufactures and sells articles embodying the invention, such person shall be held liable for the profits and damages resulting therefrom, not under the patent statutes but upon the principle that equity will not permit one to unjustly enrich himself at the expense of another."

Petitioners throughout this extended litigation have attempted to persuade the Court to believe that the injunction puts them out of business. There is no evidence in this record that will support any such conclusion. As a matter of plain fact, the injunction prohibits petitioners from using parts made from the drawings filched from

respondents. It does not prohibit petitioners from using any one or more of the many other ways of making flashers. There is not a scintilla of evidence in the record that the method used by respondents is the only method that is available for accomplishing the animation of signs.

SUMMARY.

This is a trade secrets case. It relates to an Employer-Employee relationship and to the Defendants Employees breach of their fiduciary obligation to the Plaintiff Employer. It involves no patent and no claim for patent protection. The petitioners, while in the confidential relationship of Employer-Employee, filched the trade secrets, copied them and used them in setting up a new business in competition with respondents.

The Supreme Court of Illinois holds that petitioners should be enjoined for a "period of time required for the production of the flashers by lawful means," and should respond in damages.

Petitioners strive to convince this Court that the doctrine established in the *Sears* and *Compco* cases should be extended to cover a simple uncomplicated trade secrets case involving the obligations of employees to their employer.

We have shown this Court has long recognized the law of trade secrets and that there is no conflict between that law and the law established by *Sears* and *Compco*. The Court of Appeals in *Servo* has so held and Professor Milton Handler and Mr. Lionel Kestenbaum agree.

There is no question under the Fourteenth Amendment for the reason as Mr. Justice Holmes, so aptly put it, the starting point for the present matter is not property or due process of law, but that defendants stood in confidential relations with the plaintiffs.

Additionally, the relief granted does not tend to establish a monopoly but to restore to respondents what was wrongfully and surreptitiously taken from them.

Finally, and fundamentally, respondents rely upon this Court to support precedent and the prevailing trend to combat commercial immorality. In the recent case of *Hollywood M. P. Equipment Co.* v. *Furer,* 16 Cal.2d 184, 188, 105 P.2d 299, 301 (1964) the Supreme Court of California stated the very basic foundation of the law of trade secrets, as follows:

> "Defendant did not acknowledge the dominance of a fundamental precept of honesty and fair dealing, enjoined by the Decalogue and supported by prevailing moral concepts. 'Thou shalt not steal' applies with equal force to the industralist of a complex civilization as to the simple herdsman of ancient Israel."

The cause of justice will be served by the denial of the petition for a writ of certiorari.

Respectfully submitted,

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March 8, 1966